

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

IN THE MATTER OF:
ELLEN WARREN,

Appellant,

v.

DEPARTMENT OF HEALTH
and SOCIAL SERVICES,

Employer/Agency.

DOCKET NO. 00-04-210

DECISION AND ORDER ON
MOTION TO DISMISS

LEGAL HEARING

COPY

Before Brenda C. Phillips, Chair; John F. Schmutz, Esquire, Member; Dallas Green, Member; and John W. Pitts, Member, constituting a quorum of the Merit Employee Relations Board ("Board") as required by 29 Del.C. §5908(a).

AND NOW, WHEREAS, the above-referenced matter came before the Board for a legal hearing on October 25, 2000 based upon a motion by the Department of Health and Social Services ("Agency") to dismiss the appeal filed by the grievant, Ellen Warren, on several grounds.

APPEARANCES

For the Agency: A. Ann Woolfolk
 Deputy Attorney General
 State of Delaware, Department of Justice
 820 N. French Street
 Wilmington, DE 19801

For the Appellant: Roy Shiels, Esq.
 Brown, Shiels & Chasanov
 108 E. Water St.
 P.O. Drawer F
 Dover, DE 19903

NATURE AND STAGE OF THE PROCEEDINGS

This matter comes before the Board by the filing of a grievance appeal from Step 3 of the Merit System Grievance Process on December 20, 1999. The Step 3 grievance hearing was held on March 17, 2000 and resulted in a denial of the grievance of Ellen Warren ("Grievant"). Ms. Warren works for the Department of Health and Social Services ("Agency"). As noted in the Step 3 decision, Grievant asserts that she was wrongfully denied preferential consideration as a promotional candidate for the position of Labor Relations Officer at the Agency. She alleged that the failure of the Agency to grant her an interview for the vacancy constituted a gross abuse of discretion, in violation of Merit Rule 13.0100. She also asserted that 29 Del.C. §5918 provides promotional candidates preferential rights in the hiring process.

By motion dated September 1, 2000, the Agency seeks to have the Board dismiss this grievance appeal on the grounds that the Grievant grieved a violation of an alleged right to an interview for the position, where no merit rule or statute grants any classified employee a right to an interview. Additionally, the motion seeks dismissal on the basis that the grievance was not timely filed. The Agency notes that interviews for the position were conducted on November 9 and November 12, 1999. On November 30, 1999, Grievant learned that all interviews had been completed. Grievant did not file her grievance until December 20, 1999, beyond the 14 calendar day requirement of Merit Rule 20.6. The motion also asserts that assuming, arguendo, Grievant truly grieved a failure to get a promotion, the grievance should be dismissed because it did not violate Merit Rule 13.0100 on the following grounds: (a) this

was not a promotion case because the Labor Relations Officer position was filled from the outside, thereby making Merit Rule 13.0100 inapplicable; and (b) none of the three reasons for a grievance under Merit Rule 13.0100 were alleged by Grievant. Specifically, under Merit Rule 13.0100, Grievant did not allege that the chosen candidate did not meet the minimum qualifications for the position, did not allege a violation of Merit Rule 19.0100 or any other procedural rule, and did not allege that there had been a gross abuse of discretion in the promotion based upon the mandatory factors set forth in Merit Rule 13.0100. Finally, the Agency argued that Grievant misread the language of Merit Rule 13.0100 by her claim that the Agency was required to place her in the vacant position. It alleged that such a grievance is specifically prohibited by Merit Rule 20.2.

In her response to the motion dated October 15, 2000, Grievant argued that the 14-day limit of Merit Rule 20.6 did not begin to run until December 16, 1999. Specifically, Grievant asserted that following the Agency's response on November 30, 2000, Grievant further inquired whether preferences for state service were considered. The Agency's written answer on December 16, 1999 led Grievant to conclude that preferences were not considered. Additionally, Grievant alleged that her grievance is for the Agency's failure to give preferential consideration to qualified classified employees seeking promotion, in accordance with Merit Rule 13.0100 and 29 Del.C. §5918. Grievant further alleged that the Agency's failure to select a qualified classified employee for promotion to a vacancy, which is, instead, filled by a non-classified person, without a showing that such is in the best interest of the classified service, constituted a gross abuse of discretion by the Agency. Finally, Grievant asserted that she was not contending that the Agency was required to award her the vacant

position. Rather, Grievant alleges that the Agency failed to consider any preference for qualified classified employees seeking promotion to a vacant position.

After a continuance was requested by the Grievant and granted by the Board, this matter was set for a legal hearing on the motion to dismiss on October 25, 2000. After considering the presentations of both parties, the Board voted unanimously to deny the Agency's motion to dismiss for the reasons set forth below.

THE LAW

29 Del.C. §5918

The rules shall provide for promotions, giving consideration to the applicant's qualifications, performance record, seniority, conduct and, where practicable, to the results of competitive examinations. Vacancies shall be filled by promotion whenever practicable and in the best interest of the classified service. Any promotional competition for a position funded solely by general funded appropriations, involving 2 or more candidates and a qualifying examination certified by the Director, shall be considered a competitive examination under §5917 of this title.

Merit Rule 13.0100

Vacancies shall be filled by promotion wherever practical and in the best interest of the classified service.

Whenever a position is to be filled by promotion, the candidate shall meet the minimum requirements of the class specification. Consideration shall be given to qualifications, performance record, seniority, conduct and, where applicable, the results of competitive examinations.

No grievance may be maintained concerning a promotion except where:

- (1) the person who has been promoted does not meet the minimum qualifications;
- (2) there has been a violation of Merit Rule 19.0110 or any of the procedural requirements in the Merit Rules; or
- (3) there has been a gross abuse of discretion in the promotion.

Merit Rule 20.2

A "grievance" means an employee complaint about the application of the Rules or the

her appeal and can not change it on appeal now.

Additionally, the Agency alleged that assuming, arguendo, Grievant had a grievance based on Merit Rule 13.0100, Grievant still failed to state a claim because there was no requirement that the Agency fill positions by promotion. Rather, the language is tempered by the phrase, "wherever practical and in the best interest of the classified service."

The Agency argued that the statute or the Merit Rules do not provide a preference for classified employees. Also, in the past, the Board has found that there is no preference for state employees in the promotional process. In support of this, the Agency submitted copies of decisions, Ringer v. Dept. of Transportation, MERB, Docket No. 98-10-168 (June 9, 1998), and Murphy v. DNREC, MERB, Docket No. 98-01-143 (Feb. 18, 1999). In Ringer, the grievant argued that there was a preference given by Merit Rule 13.0100 in that he, as a state employee, was entitled to a preference. The Board in Ringer found that the Department of Transportation clearly had discretion to post the position publicly for open competition. The Board in Ringer noted that "[t]he preference expressed in Merit Rule 13.0100 for filling vacancies through promotion is clearly conditioned by the phrase 'wherever practical and in the best interest of the classified service.'" Ringer, at p. 8. In the case sub judice, the Agency argued that Grievant was making the same argument that was rejected by the Board in Ringer. Similarly, in Murphy, the Agency argued that the Board there found that the employer was entitled to rate and select a candidate it believes is the most qualified, regardless of whether the candidate was seeking a promotion and was an existing State employee. See Murphy, at p. 15.

The Agency concluded that any purported preference afforded under Merit Rule 13.0100 is eliminated by the language of "wherever practical and in the best interest of the

classified service."

Finally, the Agency argued that Merit Rule 20.0200 prohibits an employee from grieving a substantive policy. The Agency noted that when read in conjunction with Merit Rule 13.0100, a remedy for violation of that rule existed, provided an employee fell under one of the three factors enumerated in Rule 13.0100. Otherwise, to grieve the language of Rule 13.0100 is what Merit Rule 20.0200 expressly prohibits, which deals with the substantive policy set forth in the statute and the rule. Therefore, the Agency argued that Grievant's appeal should be dismissed.

In response, Grievant argued that the appeal was not time barred under Merit Rule 20.1 because Grievant filed the appeal within 14 days of the notice from her supervisor she received on December 16, 1999. Grievant further argued that the grievance is about the Agency's failure to follow the requirements of 29 Del.C. §5918 and Merit Rule 13.0100. Grievant agreed that there are qualifications on a preference, as a preference is not absolute. Grievant also argued that the motion to dismiss was presented before hearing any of the facts or evidence.

Additionally, Grievant alleged that the Agency did not comply with Merit Rule 13.0100, which requires an employer, in deciding to promote an existing employee or hire a new employee, to consider whether a preference applies, whether a particular employee, because of preference, should be selected, or someone else has some other qualification that is more dispositive. Grievant argued that an employer which fails to make these considerations constitutes a gross abuse of discretion. Grievant asked that the Board hear the facts of the case, determine whether or not any preference was considered, and determine whether the

Agency complied with the Merit Rules.

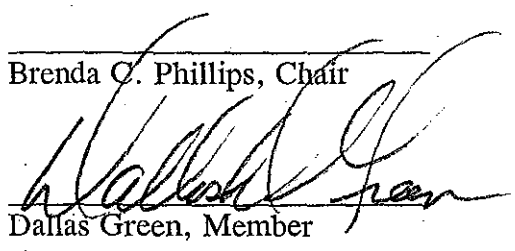
Although the Grievant acknowledged that the Agency has discretion, she contended that the discretion is not unlimited. Finally, Grievant noted that the case of Ringer involved a full, evidentiary hearing, where the grievant presented facts and evidence. Grievant noted that the Board found the facts presented in Ringer were insufficient to carry the burden of proof. Grievant argued that regardless of Merit Rule 20.0200, she was entitled to a hearing to present evidence to try to show that it was practical and not in the best interest of the service to select someone else.

Based upon all facts presented in the record at the time of the legal hearing, the Board found that there was no clear evidence that the grievance was untimely, pursuant to Merit Rule 20.06. Further, the Board found that there was no clear evidence in the record thus far that there had not been a gross abuse of discretion. The Board believes that an evidentiary hearing will clarify this issue.

ORDER

For the foregoing reasons, the Board denies the Agency's Motion to Dismiss.

IT IS SO ORDERED this 21st day of February, 2001.


Brenda C. Phillips, Chair

Dallas Green, Member


John F. Schmutz, Esquire, Member


John W. Pitt, Member

APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del.C. §10142 provides:

(a) Any party against who a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within thirty (30) days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date:

2/22/01

Distribution:

Original: File

Copies: Appellant's Representative
Agency's Representative